Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause requires the denial of equal access to a small, voluntary, student-initiated and student-led group wishing to meet for religious speech in a limited open forum created by a public high school.

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BRIEF FOR PETITIONERS

Petitioners, Michael Bender, et al., Williamsport Area High School students, who are members of Petros, an unincorporated association (hereinafter, collectively, "the students" or "Petros"), respectfully ask this Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (P. App. A) is reported at 741 F.2d 538. The opinion of the District Court (P. App. C) is reported at 563 F. Supp. 697.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1984. The court's order denying rehearing and suggestion of rehearing *en banc* (P. App. B), was entered on August 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for a writ of certiorari was granted February 19, 1985.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Access Act, 20 U.S.C. §§ 4071-74, enacted on August 11, 1984, is reprinted at Appendix E to the Petition.

STATEMENT OF THE CASE

A. The Facts

Williamsport Area High School ("Williamsport High") is a 2500-student secondary school which serves students in grades 9 through 12. J.A. 63.[1] Williamsport High draws students from about a 100 square mile area and is located on a 147 acre campus, more than a mile from the nearest residence. J.A. 63, 70-71. Consequently, the vast majority of the students arrive and leave the school by bus. J.A. 69. Students are to be in their homerooms at 7:45 AM for twelve minutes during which attendance is taken and announcements made. J.A. 102.

On Tuesday and Thursday mornings, the school has an extracurricular activity period which runs from 7:57 AM to 8:27 AM, immediately following homeroom. J.A. 66-68, 102-104. The purpose of the activity period is to accommodate those student activities that contribute "to the intellectual, physical, or social development of the students and [are] otherwise considered legal and constitutionally proper." P. App. A at 9a, quoting affidavit of Principal Wayne Newton. It is "a time during the day in

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[1] Citations to the record as reprinted in the joint appendix will be denoted as "J.A.". Citations to materials in the appendix accompanying the petition for a writ of certiorari will be denoted as "P.App.".

which students can take care of all extracurricular activities." J.A. 68 (Dep. of Principal Newton). On Tuesdays and Thursdays, classroom instruction does not begin until 8:31 AM. J.A. 68, 102-105.

During the activity period, students may choose to participate in any one of more than 25 activities, ranging from academic interests to recreational and social pursuits, or to form their own group.[2] Students also have the option of remaining in their homerooms, studying in the library, or visiting the computer station to receive career guidance and college preparation. *Id.*; P.App. A at 7-8a. Attendance at any of the activities is left to the individual student and is completely voluntary. P. App. A at 8a, 18-20a. The activity period is not tied to the formal curriculum of the school. P. App. A at 19a.

In September, 1981, three students, Lisa Bender, Morris Braggs, and Kerry Hunter, all seniors, asked Mr. Wayne Newton, the school principal, for permission for themselves and other interested students to meet during the activity period for Scripture reading, discussion, and prayer. Mr. Newton initially granted their request, but advised them that they could not use the public address system or bulletin boards to publicize the meeting. P. App. A at 6a; J.A. 142.

Forty-five students, or less than 2 percent of the student body, attended the first meeting of this group, later to be called "Petros". *Id.* A teacher opened the room, took attendance, and remained in the room grading

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[2] Student clubs which are currently active include: Student Government; Peer Helpers; Key Club; Class organizations; Business English Club; Future Homemakers of America; Vocational-technical Club; Spanish Club; Ecology Club; Speech and Drama Club; Office Aides; Band; Choir; Student Newspaper; Student Literary Art Magazine; and a Student Yearbook.

Other clubs which have been approved in the past and might be renewed if interest warranted are: Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Club. P.App. A at 8a n.8.

papers, but took no part in the meeting. P. App. A at 9-10a. The students read a few Bible verses without comment, and some students shared concerns for which they wanted prayer, and a few students prayed. J.A. 142-43. The school did not receive any complaints from anyone about the meeting. J.A. 76, 96.

At the second meeting of the group, Morris Braggs told the 20 students in attendance that Mr. Newton had decided Petros could not meet until he had obtained approval from the superintendent of schools and the school's attorney. Mr. Newton expressed concern to the students over the constitutionality of the meeting. J.A. 74. After a short prayer, the students immediately disbanded and returned to their homerooms. J.A. 143.

On October 1, 1981, the students wrote a letter to the school district superintendent expressing their disappointment at being barred from meeting. J.A. 54, 56. In response, the superintendent told them it would be "legally improper for a School District to approve or endorse such an activity on school district premises or on school time." J.A. 42 (letter of Superintendent Oscar Knade to Morris Braggs). He told them that they could not meet until the school's attorney had issued a written opinion on the matter. He asked the students to provide him with information about the proposed activity including information about faculty role, meeting times, and likely membership. *Id.* The students provided the superintendent with the requested information on October 23, 1981.[3]

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[3] The student proposal submitted at the superintendent's request reads as follows:

NAME OF THE ORGANIZATION

[Petros] (The Rock)

THE NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

[Continued]

The following week, the school's attorney issued a written opinion which concluded that for the school to permit Petros to meet would violate the First Amendment. J.A. 39. On November 16, 1981, the school principal and the superintendent met with six Petros student representatives to explain the reasons based on the Constitution for banning their meeting. J.A. 39-40, 54. The students were not permitted to meet before or after school on campus. J.A. 75, 93.[4]

The students appealed to the school board. J.A. 47. On January 19, 1982, the school board approved the ban, again on advice of counsel. J.A. 48-49. Two days later,

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[3] [Continued]

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

P.App. A at 5-6a. There is no formal mechanism or procedure for applying to be allowed to meet during the activity period, other than oral and possibly written request as was done by the students. *Id.* at 8a n.8.

[4] An off-campus "released time" option was discussed. This was not feasible, however, in view of the 30-minute time allowed for the activity period and the school's isolated location (over one mile from the nearest residence), coupled with the fact that the vast majority of the students are bused and, therefore, have no independent transportation. J.A. 68-71.

the president of the board sent the students a letter denying their appeal, stating as the basis for the denial:

> The solicitor [has] advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

J.A. 48-49.

According to Mr. Wayne Newton, the school principal since 1974, no group of students had ever been denied permission to meet during the activity period, except the students before this Court. P.App. A at 8a. The decision banning the students' meeting was made *solely* on the advice of the school district attorney that such a meeting would violate the Establishment Clause of the United States Constitution. P.App. A at 21a; J.A. 48-49.

There is no evidence that the school district has ever initiated or promoted a religious activity in the past. In the past, the school has offered elective courses in "Literature of Western Religions", although it was not offered in 1981-82. J.A. 87.

On June 3, 1982, ten student members of Petros and their parents brought suit against the school district, its administrators and the school board members in the United States District Court for the Middle District of Pennsylvania. The complaint alleged that denying them permission to meet violated their freedom of speech, free exercise of religion, freedom of association, and equal protection rights. Defendants' answer substantially admitted the facts in the complaint and relied on the Establishment Clause as their defense.

B. The Decision of the District Court

After discovery, the parties filed cross motions for summary judgment. Chief District Judge William Nealon

granted summary judgment to the students on their free speech claim and granted summary judgment to the school board on the free exercise of religion claim. In holding for the students, the court relied on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and held that the school had denied the students the right to meet during the activity period, a limited open forum for students' speech, solely because their speech was religious. P. App. C at 102a.

The district court held that "*under the precise set of undisputed facts presented*", accommodating the students' speech would not violate the Establishment Clause. *Id.* (emphasis in original). Therefore, the school district had not demonstrated a compelling state interest to justify abridgment of the students' freedom of speech.

The district court held that the limited open forum had a self-evident secular purpose. *Id.* at 88a. Second, the primary effect of equal access would be the accommodation, not the advancement, of religion, given the "broad spectrum of student groups" meeting, as in *Widmar*. *Id.* at 90a. The district court found that high school students are mature enough to appreciate the neutrality of equal access, particularly absent the coercion which had existed in the "traditional school prayer cases." *Id.* at 97a. Third, no excessive entanglement was found "[i]nasmuch as the teacher would be present only to ensure orderly meetings" and "would be the functional equivalent of a policeman at a religious rally held in a public park." *Id.* at 99-100a.

Following the district court decision, the students met during the activity period for the 1983-84 school year. In letters exchanged between the attorneys for the students and the school district, the meetings were described as being student-initiated, student-led and orderly. P. App. D at 107a.[5] Members of the group discussed peer

[5] The subsequent conduct of the meetings in 1983-84 is not part of the record in the proceedings below. However, the continued accuracy of the factual findings of the district court regarding the

problems, school problems and home problems; some read Scripture and prayed. *Id.* A teacher sat at a table in a different part of the room from the students, graded papers and prepared lesson plans. *Id.* The meetings were held in a section of the cafeteria away from all other classrooms and students. *Id.* No students at the school believed that the meetings were "school-sponsored", and there was no divisiveness stemming from the meetings. *Id.*[6]

C. The Decision of the Court of Appeals

Defendant John Youngman appealed the district court's ruling on the students' free speech rights to the U.S. Court of Appeals for the Third Circuit.[7] On July 24,

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nature of the meetings in 1981 were not disputed by the court of appeals and can be accepted by this Court.

[6] *See also*, Taylor, "Student Prayer Group Sues for Right to Meet," *The New York Times*, August 7, 1984, at 8 ("But at the Williamsport high school, by all accounts there has been no hint of pressure for students to join Petros, which has both supporters and opponents in the Williamsport community, and nothing resembling official endorsement of religious activity.").

[7] The school board members were sued both in their official and individual capacities. After the parties filed their briefs on the merits in the court of appeals, Mr. Youngman's tenure on the school board ended. A petition for attorneys' fees under 42 U.S.C. 1988 is pending before the district court against Mr. Youngman and the other defendants.

Williamsport Area School District has continuously treated Mr. Youngman's appeal as its own. On October 10, 1984, the school district denied the students permission to meet for religious speech because of the Third Circuit decision. See P.App. D. In addition, on September 1, 1983, the school district entered a brief in opposition to the students' petition for attorneys' fees in excess of $20,000, under 42 U.S.C. 1988, on the grounds that the district court decision was on appeal to the Third Circuit and, if the decision were reversed, the students would not be the prevailing party. J.A. 146-48. On December 14, 1983, the district court ordered the fee petition held in abeyance pending the outcome of the appeal. J.A. 152-55. On August 29, 1984, the school district moved for dismissal of the students' petition for attorneys' fees before the district court, on the grounds that students were no longer the prevailing party in the district court after the court of appeals decision. J.A. 156-63.

1984, a divided panel of the Third Circuit reversed the district court holding on the basis of the Establishment Clause. It agreed with the district court's holding that, under *Widmar*, the defendants had violated the students' free speech right by excluding them from a limited public forum solely on the basis of the religious content of their speech. P. App. A at 20-21a.

However, the panel majority held that the Establishment Clause would be violated by allowing the students to meet. Although it agreed that the secular purpose of the forum was "manifest", *id.* at 23a, it held that accommodating the students' religious speech would have the primary effect of advancing religion and result in excessive entanglement. *Id.* at 32a, 35a.

The Third Circuit rejected the Establishment Clause analysis in *Widmar* as inapplicable to high school students. Having held that both the Free Speech Clause and Establishment Clause were violated, the panel believed it faced "a constitutional conflict of the highest order . . . . with no definitive guidance from the Court as to the proper direction to take." *Id.* at 36a. It held that the Establishment Clause outweighed the students' free speech rights. *Id.* at 41a.

Judge Adams dissented on the grounds that the majority opinion is inconsistent with *Widmar* v. *Vincent*. Specifically, Judge Adams wrote that the majority's "bright line rule—no prayer in public secondary schools" is a "wooden reading of the First Amendment" and "at variance with controlling precedent." *Id.* at 45-46a. Having refuted the majority's distinctions between *Widmar* and Williamsport, Judge Adams suggested that the majority's concern "stems not from the prospect of establishment of religion by the presence on the campus of Petros, but from the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere", which "can be dealt with as they arise." *Id.* at 61a.

On August 15, 1984, with two judges dissenting, the Third Circuit denied the students' petition for rehearing

and request for rehearing *en banc*. On August 28, 1984, the Third Circuit issued a stay of mandate until November 13, 1984, pending the filing of the petition for a writ of certiorari. This Court granted the petition on February 19, 1985.

On September 20, 1984, the school turned down the students' request for permission to meet during the activity period for the 1984-85 school year on the same basis as the students had met the year before. On October 10, 1984, the school board again denied the students' request to meet. P.App. D.

On July 25, 1984, the United States House of Representatives passed the Equal Access Act by a vote of 337-77, which had passed the Senate on June 27, 1984, by a vote of 88-11. 20 U.S.C. §§ 4071-74. On August 11, 1984, President Reagan signed the Act into law, thereby prohibiting a public secondary school which has a limited open forum from denying equal access to students who wish to meet for "religious, political, philosophical, or other speech".

SUMMARY OF THE ARGUMENT

Williamsport Area School District believes the Constitution prohibits any accommodation of student-initiated and student-led religious speech on campus. Therefore, it has singled out the students before this Court for unique exclusion from an expressive forum created by a high school, solely because their speech is religious.

The analysis of this Court in *Widmar* prohibits such a prior restraint on extracurricular religious speech of high school students. By holding unconstitutional the accommodation of high school students' religious speech on an equal access basis, the court below has propounded a peculiar constitutional paradox. According to the court below, the Constitution *requires* public high schools to discriminate against religious speech, even though it *forbids* public universities from doing so. This result is inherently implausible.

The Establishment Clause does not require a prior restraint on these students' freedom of speech for several reasons. First, the Establishment Clause is a restraint on religious speech of the state and its agents; it is not, and must not become, a prohibition on religious speech of private individuals with their peers. The Establishment Clause decisions of this Court have required the prohibition of *state*-initiated, not *self*-initiated, religious speech.

Second, equal access for these students' religious speech is consistent with this Court's analysis in *Widmar* utilizing the tripartite test. Equal access for students' extracurricular religious speech is truly state neutrality toward, not state advancement of, the students' religious views. High school students are capable of correctly perceiving equal access as state neutrality rather than state endorsement, as decisions of this Court and the lower federal courts, Congressional findings, and the facts in this case demonstrate. Indeed, denial of equal access due to speculative and unsupported fears of students' misperceptions would build into society a serious distortion of the First Amendment.

Besides having a self-evident secular purpose, equal access avoids an excessive entanglement. If school officials are required to deny equal access to students engaging in religious speech, they will be forced to determine whether students' speech is or is not religious, an impossible task which invites lawsuits.

Finally, equal access for high school students' religious speech avoids an unnecessary conflict between the Free Speech Clause and the Establishment Clause. Several less restrictive alternatives exist for protecting high school students' religious speech without infringing upon the Establishment Clause.

If equal access is ruled unconstitutional, school officials will believe all students' individual religious expression must be stifled. Students whose personal conduct is otherwise exemplary may be disciplined solely for ex-

pressing their religious values and ideas at a time when other students are allowed to express themselves.

The Constitution does not require school officials to discriminatorily ban students' extracurricular religious speech. Instead, equal access is a fair and reasonable approach toward resolving the longstanding debate regarding religious activity on the public high school campus.

ARGUMENT

I. CONTENT-BASED DISCRIMINATION AGAINST THESE HIGH SCHOOL STUDENTS' RELIGIOUS SPEECH VIOLATES THEIR FREEDOM OF SPEECH.

A. The First Amendment protects religious speech by high school students.

High school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (uphoiding free speech right of students to wear armbands protesting Vietnam War). As this Court emphasized in *Tinker*, "personal intercommunication among the students . . . is not only an inevitable part of the process of attending school; it is also an important part of the educational process." 393 U.S. at 512.

Following *Tinker*, the federal courts have vigilantly protected the free speech rights of high school students. *See, e.g., Fraser* v. *Bethel School District No. 403*, 755 F.2d 1356 (9th Cir. 1985) (student's sexually suggestive speech at school assembly protected by First Amendment); *Stanton* v. *Brunswick School District*, Civil No. 83-0464P (D. Me. Jan. 23, 1984) (student's choice of graphic description of person being executed as caption for her yearbook picture protected); *Fricke* v. *Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (homosexual escort to school senior dance is protected speech); *Gambino* v. *Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977) (contraceptive information in student newspaper

protected); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D. N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975) (same); *Dixon* v. *Beresh*, 361 F. Supp. 253 (E.D. Mich. 1973) (high school's denial of recognition to students' socialist political group unconstitutional); *Garvin* v. *Roseneau*, 455 F.2d 233 (6th Cir. 1972) (prohibition of high school Students Mobilization Committee raises substantial federal question); *Riseman* v. *School Committee*, 439 F.2d 148 (1st Cir. 1971) (students' distribution of political literature protected); *Scoville* v. *Board of Education*, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970) (student newspaper, *Grass High*, critical of school administration protected).

In this case, these students have requested permission to meet during the student activity period to read the Bible, pray, and discuss religious matters, in order to "promote spiritual growth and positive attitudes" in their own lives. *See supra* note 3. These students simply want to meet with other students who share similar values to encourage one another to stand firm in an environment that is not always conducive to those values. See J.A. 16, 18.[8] High school students individually must make critical moral decisions regarding the use of drugs,[9]

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[8] The time we spent in prayer and fellowship was a very uplifting time. It added to our day . . . knowing that other students were behind you in what you believed, and knowing that you could meet together to pray and ask God to help us to study and help us to learn the things that He would have us to learn.

Equal Access: A First Amendment Question: Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 44 (1983) (testimony of Ms. Lisa Bender); see *The New York Times*, *supra* note 6 (quoting Petros member Julie Harbot as saying, "It was a time to come together and be with each other, to help each other through problems at the school.").

[9] In 1984, 61.6 percent of high school seniors had used illicit drugs (excluding alcohol), including 45.8 percent who had used illicit drugs in the last year. L. Johnson and J. Backman, *Use of Licit and Illicit Drugs by America's High School Students*, prepared for U.S. Department of Health and Human Services, Na-

abuse of alcohol,[10] sexual conduct and related decisions,[11] honesty, respect for authority, and the value of their lives.[12]

Religious speech possesses the full protection of the Free Speech Clause. *Widmar* v. *Vincent*, 454 U.S. 263, 269 (1981); see *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2135 (1984) ("Jesus Saves" is as protected as political speech).[13]

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tional Institute on Drug Abuse, forthcoming (1985); see *New Jersey* v. *T.L.O.*, 105 S.Ct. 733 (1985).

[10] In 1984, 92.6 percent of high school seniors had used alcohol, including 67.2 percent in the last month and 4.8 percent daily in the last month. L. Johnson, *supra* note 9.

[11] In 1980-81, the pregnancy rate for 15- to 19-year-old women was 96 per 1,000, of which 45 would end in abortion. "U.S. Leads Developed Nations in Rate of Teen-Age Pregnancy, Abortion Rate Also Found Disproportionately High," *Education Week*, Mar. 20, 1985, at 1. See *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); and *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

[12] In 1978, there were 263 suicide deaths per million persons between the ages of 15 and 19 years old, more than double the 1960 figure of 124. National Center for Health Statistics, *Vital Statistics of the United States: Mortality*, annual volumes; Table 5-12 (1960), Table I-8 (1978).

[13] A remarkable number of the key free speech cases have involved religious speech. *See, e.g., Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (religious speech in park); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (same); *Kunz* v. *New York*, 340 U.S. 290 (1951) (denunciation of religion on public streets); *Saia* v. *New York*, 334 U.S. 558 (1948) (amplification of religious speech in public park); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) (religious solicitation in company town); *Tucker* v. *Texas*, 326 U.S. 517 (1946) (religious solicitation in government housing project); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (religious solicitation); *Largent* v. *Texas*, 318 U.S. 418 (1943) (religious literature); *Jamison* v. *Texas*, 318 U.S. 413 (1943) (same); *Martin* v. *Struthers*, 319 U.S. 141 (1943) (same); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (religious solicitation); *Schneider* v. *State*, 308 U.S. 147 (1939) (religious literature); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (same); *see also, Heffron* v. *ISKCON*, 452 U.S. 640, 647 (1981) (religious speech protected by First Amendment);

This Court has never sanctioned discriminatory treatment of private religious speech, particularly a prior restraint on religious speech.

Students' religious expression is protected in the public high schools. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) (students' refusal to salute flag due to religious convictions protected by Free Speech Clause); see *Tinker*, 393 U.S. at 516 (Black, J., dissenting) (noting facts which indicate religious background of students' protest); *Bellotti*, 433 U.S. at 637 n.15 (*Tinker* officials were stifling discussion of political and moral issues).[14] Although school officials have "important, delicate, and highly discretionary functions", public schools "are educating the young for citizenship [which] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637; see *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960) ("[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

McDaniel v. *Paty*, 435 U.S. 618, 626 (1978) (right to free exercise of religion includes religious speech); *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) ("immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

[14] *See also*, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983) [hereinafter cited as Yale Note]; Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983) [hereinafter cited as Georgetown Note]; Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need a Constitutional Amendment*, 61 N.C.L. Rev. 141 (1982); Note, Widmar v. Vincent *and the Public Forum Doctrine: Time to Reconsider Public School Prayer*, 1984 Wis. L. Rev. 147 (1984) [hereinafter cited as Wisconsin Note].

B. High school officials discriminatorily have prohibited these students' speech solely because its content is religious.

As in *Widmar*, Williamsport High School officials refused to permit the students to meet during the student activity period solely because the content of their intended speech is religious. School officials mistakenly believed that neutral treatment of students' religious speech violated the Establishment Clause. P.App. A at 21-22a; P.App. C at 84a. These students are the only known group ever denied access to the student activity period. P.App. A at 18a; P.App. C at 81a.

As in *Widmar*, Williamsport High School has created a limited public forum by establishing the activity period in order to accommodate any student extracurricular activity that contributes to "the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper." P.App. A at 8-9a, 20a; P.App. C at 81a; see *Widmar*, 454 U.S. at 267. The activity period is "a time during the day in which students can take care of all extra-curricular activities." J.A. 68 (Dep. of Principal Newton). Over forty different student groups have taken advantage of the opportunity to meet during the activity period, including twenty-five different groups that currently meet. *See supra* note 2. As both courts below held, the students' religious speech falls within the scope of student activities permitted during the activity period, as defined by the school officials. P.App. A at 20a; P.App. C at 81a.[15]

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[15] Since the high school has established the activity period specifically for students' extracurricular expression, this Court is not deciding whether a public high school generally is a forum for student expression. *Cf., Tinker*, 393 U.S. at 511 (students' interpersonal communication protected from content-based discrimination on school campus); *ISKCON* v. *New Jersey Sports and Exposition Authority*, 691 F.2d 155, 160 (3rd Cir. 1981) ("[s]ince the exchange of ideas is an essential part of the educational process, but the need for discipline and order is great, a public high school is probably a limited forum also").

Content-based discrimination violates the Free Speech Clause. *Widmar*, 454 U.S. at 270; *Healy* v. *James*, 408 U.S. 169 (1972) (denial of recognition of controversial student group by university officials violates First Amendment); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (content-based prohibition on picketing outside public high school unconstitutional). As in *Widmar*, the school officials must demonstrate a compelling state interest to justify their content-based exclusion of these students from the activity period and demonstrate that the exclusion is narrowly drawn to achieve that compelling state interest. *Widmar*, 454 U.S. at 270; see *Tinker*, 393 U.S. at 511 (school officials specifically must show a constitutionally valid reason for prohibiting students' speech).[16] As in *Widmar*, the only compelling state interest asserted by the state is its belief that the Establishment Clause prohibits students from meeting for religious speech on the high school campus.

High school officials' discretion is not at issue in this case. The high school officials believed they had no discretion but were required by the Establishment Clause, as interpreted by the courts, to prohibit students' religious speech. P.App. C at 66a, 84a; J.A. 39, 48, 93. The school officials did not believe these students' meeting would disrupt the school environment. P.App. C at 83a; J.A. at 84-85, 97 (Dep. of Principal Newton and

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[16] Even if the Williamsport High School student activity period were not a limited public forum for student speech, the school's content-based exclusion of Petros from that period is permissible only if it is reasonably necessary to further legitimate state objectives. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); see *Widmar*, 454 U.S. at 280-81, (Stevens, J., concurring). The high school's sole reason for refusing access to Petros is the school's asserted interest in complying with the Establishment Clause. Thus, if the Establishment Clause does not require the exclusion of students' religious speech, the school's asserted justification cannot be a legitimate reason, much less a compelling state interest.

Superintendent Knade). Moreover, since the activity period is not tied to the school's formal curriculum, the school's power to prescribe an appropriate curriculum for its students is not at issue. P.App. A at 18-20; P.App. C at 84a; J.A. at 68; see *Widmar*, 454 U.S. at 276. The issue in this case is not school officials' discretion but whether the Establishment Clause requires a prior restraint on high school students' religious speech.

II. THE ESTABLISHMENT CLAUSE IS NOT VIOLATED BY ALLOWING EQUAL ACCESS TO A SMALL, VOLUNTARY, STUDENT-INITIATED AND STUDENT-LED GROUP WISHING TO MEET FOR RELIGIOUS SPEECH IN A LIMITED PUBLIC FORUM CREATED BY A PUBLIC HIGH SCHOOL.

A. The Establishment Clause restricts religious speech by the state, not religious speech by private citizens.

The Bill of Rights restricts governmental power in order to promote individual liberty. Spiritual liberty is the cornerstone of the First Amendment.[17] *By its very language*, the Establishment Clause restricts religious speech by the state, not religious speech by private citizens. Indeed, the Free Speech and Free Exercise of Religion Clauses explicitly protect religious speech by private citizens.[18]

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[17] Professor Archibald Cox has emphasized the primacy of spiritual liberty in the First Amendment order:

> The juxtaposition of the key phrases in the first amendment reveals much of the philosophy underpinning those guarantees of particular fundamental rights. The framers put freedom of conscience first, and then moved on to freedom of speech and the press. They were concerned above all else with spiritual liberty: freedom to think, to believe, and to worship.

A. Cox, *Freedom of Expression* 1 (1981).

[18] Contrary to *Widmar*, opponents of equal access often argue that the Establishment Clause requires special restrictions on private religious speech. They argue that religious speech will be "sullied" if allowed equal access to the marketplace of ideas and,

The court below erroneously applied the Establishment Clause beyond official state action to encompass the self-initiated, self-directed activities of private individuals with their peers in an expressive forum. The Establishment Clause was never intended to be a sword for discrimination against religious individuals, as it has become against these students. See *McDaniel* v. *Paty*, 435 U.S. at 641-42 (Brennan, J., concurring).

As the district court found, this case is "fundamentally different from the traditional school prayer cases." P.App. C at 96a.[19] A distinction of a constitutional dimension exists between a state-initiated religious activity in which students may choose to participate and a self-initiated, self-directed religious activity, which a school merely allows under a neutral policy of equal access for students to meet to discuss their various interests. P.App. A at 61a (Adams, J., dissenting); *cf.*, *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3346 (1983) (Brennan, J., dissenting) ("We are certainly not faced with the right of legislators to form voluntary groups for prayer or worship . . . Rather, we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business, constituting the formal opening of every single session of the legislative term.").

Specifically, this Court has found an Establishment Clause violation involving religious activity in the public

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therefore, must be specially "protected". Well-intentioned or not, such "protection" is censorship. Individuals engaging in religious speech can determine for themselves whether public expression of their views devalues their beliefs. The state has neither the constitutional authority nor the wisdom to make that determination for them.

[19] See *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971, 975 (2nd Cir. 1980) (recognizing that students' request for extracurricular prayer group "raises a different problem" from "state statutes or regulations *supporting* religious activity" in *Schempp* and *McCollum*).

schools, when the state has initiated a devotional religious activity as part of the school curriculum.[20] This Court has never held unconstitutional student-initiated, student-led extracurricular religious speech. The First Amendment does not allow the state to require religious speech by high school students, but neither does it allow the state to prohibit high school students' extracurricular religious speech.[21]

Although the court below relied heavily on *McCollum*, equal access for these students' religious speech is significantly different from the *McCollum* program, in which outside religious teachers were given special access to the classroom by school officials specifically to inculcate religious beliefs as part of the school curriculum. First, unlike these students' religious speech, the religious classes in *McCollum* were *state-initiated* religious indoctrination that "clearly raised the spector of government-endorsed and even government-coerced religious activity." P.App. A at 58a (Adams, J., dissenting). This

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[20] See *Jaffree* v. *Wallace*, 705 F.2d 1526 (11th Cir. 1983), *summarily aff'd in relevant part*, 104 S. Ct. 1704 (1984) (state-composed or state-led prayer); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (state statute and local regulations established prayer led by state-solicited student "volunteers" in classroom in daily opening exercises); *Stone v. Graham*, 449 U.S. 39 (1980) (state statute requiring posting of the Ten Commandments on public classroom walls); *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (state laws requiring daily Bible reading and recitation of the Lord's Prayer in public classrooms); *Engel v. Vitale*, 370 U.S. 421 (1962) (recitation of a state-composed prayer in public classrooms required by statute); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (school officials pursuant to state statute invited only religious outsiders to conduct religious classes as part of the school curriculum).

[21] *Compare Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (state violates the First Amendment if it requires that persons affirm belief in God in order to hold public office) *with McDaniel* v. *Paty*, 435 U.S. 618 (1978) (Establishment Clause does not justify state constitutional prohibition on participation in public office by religious persons).

Court emphasized "the close cooperation between the school authorities and the religious council in promoting religious education", 333 U.S. at 209, which is "clearly not the case here." P.App. A at 58a (Adams, J., dissenting); see P.App. at 28a (unlike Williamsport, *McCollum* school district had "no valid secular purpose in providing classrooms for religious instruction").

Second, unlike these students' religious speech, the *McCollum* religious classes were religious inculcation by the state as part of its *curriculum*. As this Court observed, the *McCollum* students were released from their legal duty of secular education "upon the condition that they attend the religious classes". *McCollum*, 333 U.S. at 210. Again, the few students who did not choose to participate in religious indoctrination had but one choice: They could conspicuously leave the classroom to attend a study hall. As the court below recognized. "unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations [at Williamsport Area High School] depends entirely upon voluntary student participation and interest." P.App. A at 18a.

Third, unlike equal access for these students' religious speech, *McCollum* was a case of *special* access for religious outsiders. In *Widmar*, this Court specifically distinguished *McCollum* from an equal access case:

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. *See, e.g., McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

454 U.S. at 272 n. 10. The benefit of the activity period in this case is not limited to religion, unlike the instruction period in *McCollum*, but is extended to a broad range of interests, as in *Widmar*. P.App. A at 28a.

Although school administrators must be diligent to ensure their neutrality in religious matters, as a result of legal counsel, Williamsport school officials have gone beyond policing official state speech to policing students' extracurricular speech. The decisions of this Court have not required, nor have they sanctioned, such censorship in the name of the Establishment Clause. See *Widmar*, 454 U.S. at 273.

B. Equal access for these high school students' extracurricular religious speech is consistent with the tripartite test.

1. *The high school has a secular purpose in allowing students to meet during the activity period.*

As the district court correctly noted, "the question is not whether an individual's activity can be characterized as having a religious purpose. Rather, the focus is whether the government policy which *allows* the activity has a secular purpose." P.App. C at 86a, *citing Widmar*, 454 U.S. at 271 (emphasis in original). Furthermore, a non-secular purpose will not be inferred lightly. *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1362-63 (1984).

For many years, Williamsport Area High School has had an activity period for the purpose of allowing student groups which "promote the intellectual, physical and social development of its students" to meet. P.App. C at 87a. As both courts below agreed, there is no indication that the Williamsport Area School District created the activity period for anything other than valid educational purposes. P.App. A at 23a; P.App. C at 87a. Indeed, this litigation belies any notion that the Williamsport Area School District created the activity period for a nonsecular purpose. *Id.*

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[22] Thus, this case is distinguishable from a case in which adoption of an equal access policy by a school district with a past history of questionable practices was suspect. See *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d

2. *Equal access for these students' religious speech is a neutral accommodation of religion that does not have the primary effect of advancing religion.*

In *Widmar*, this Court held that equal access for a religious student group to a limited public forum created by a state university does not have the primary effect of advancing religion. 454 U.S. at 273. Applying the *Widmar* analysis to the facts of this case, the district court below found that allowing these students to meet for religious speech would be a neutral accommodation of religion and would not have the primary effect of advancing religion. The district court concluded:

> [Petros] seeks the administration's passive acquiescence—leaving them to pray and discuss matters that concern the religious aspect of their lives. In essence, these students want the government passively to acknowledge that they have religious interests, just as others are 'benefitting' from the government's recognition that they are interested in sports, journalism or the theater. By recognizing that students have these religious interests, the school would not be 'advancing' religion in the Establishment Clause sense, for the Constitution itself recognizes the existence of such interests. *Any advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity.*

P.App. C at 91a (emphasis added).

a. *Williamsport Area High School cannot reasonably be perceived as promoting these students' religious speech, since the activity period is available to a broad spectrum of student groups and school administrators are neutral in the students' choices of activities.*

This Court has repeatedly held that a state policy that neutrally treats religious and nonreligious persons in the

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1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983). P.App. C at 87a.

same manner does not have the primary effect of advancing religion. See *Widmar*, 454 U.S. at 274 (equal access to limited forum created by university does not have primary effect of advancing religion, because forum is open "to a broad class of nonreligious as well as religious speakers."); *Mueller* v. *Allen*, 103 S.Ct. at 3062, 3069 (1983) ("a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."); *see also*, *Wolman* v. *Walter*, 433 U.S. 229, 242 (1977); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1969); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *cf. McDaniel* v. *Paty*, 435 U.S. 618 (1978) (Establishment Clause does not justify discriminatory treatment of religious persons).[23]

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[23] Since *Widmar*, several lower courts have applied its analysis to find no primary effect of advancement of religion where a state policy allows access to religious and nonreligious speakers. *See, e.g.*, *McCreary* v. *Stone*, 739 F.2d 716 (2nd Cir. 1984) (Establishment Clause does not require denial of equal access to public park to citizen group for religious symbolic speech), *aff'd by an equally divided court*, 53 U.S.L.W. 4431 (U.S. Mar. 27, 1985); *Clergy and Laity Concerned* v. *Chicago Board of Education*, 586 F. Supp. 1408 (N.D. Ill. 1984) (denial of equal access to outside religious group wishing to discuss legal alternatives to military service, when outside military group allowed on campus during school hours, held unconstitutional); *Berkshire Cablevision of Rhode Island, Inc.* v. *Burke*, 571 F. Supp. 976 (D.R.I. 1983) (state regulation requiring cable television operator to construct an institutional network for programming at institutions, including religious institutions and parochial schools, does not have primary effect of advancing religion); *Country Hills Christian Church* v. *Unified School District No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (religious community group cannot be denied equal access to school facilities once school district created a public forum for use of the facilities during nonschool hours by community groups); *Civil Liberties Union of Mass.* v. *School Committee*, Civil No. 15281 (Mass. Dist. Ct., Sept. 4, 1984) (same).

In addition to the district court below, some courts have indicated that equal access for religious student groups does not have the primary effect of advancing religion. See *Amidei* v. *Spring Branch Independent School District*, No. H-84-4673 (S.D. Tex. April 26,

As in *Widmar*, equal access for these students' religious speech does not have a primary effect of advancing religion. P.App. A at 46a (Adams, J., dissenting) ("I do not believe that Petros can be meaningfully distinguished from the student religious group permitted to meet in a public university by *Widmar*."). The availability of a limited forum to a broad class of nonreligious as well as religious speakers is an important indication of primary secular effect for two reasons.

First, a broad class of speakers indicates that the state is not endorsing the views of a particular group, since it generally allows a large number of groups with diverse

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1985) (Equal Access Act held constitutional); *Nartowicz* v. *Clayton County School District*, 736 F.2d 646, 649 (11th Cir. 1984) (in affirming preliminary injunction prohibiting school district from allowing equal access for religious student group, dicta suggests equal access may be permissible if "the school district merely accommodates, as opposed to endorses" the students' religious speech.); *Bell* v. *Little Axe Independent School District No. 70*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), *appeal docketed*, No. 83-1458, 83-1493 (10th Cir. April 5, 1983), *argued*, Sept. 10, 1984 (school district policy allowing equal access upheld if meetings held after and not before classes); *Harrisburg Chapter of the ACLU* v. *Scanlon*, No. 1181 C.D. 1981 (Pa. Commw. Ct. July 30, 1982) (relying on *Widmar*, court refused to enter consent decree in which school districts agreed to prohibit equal access for religious student meetings), *aff'd on procedural grounds*, 458 A.2d 1352 (Pa. 1983); *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (in a pre-*Widmar* decision, voluntary student meetings for prayer before classes began held constitutional). *But see*, *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038, *cert. denied*, 459 U.S. 1155 (1983) (equal access policy adopted by school district with past history of unconstitutional religious practices unconstitutional); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, *reh'g. denied*, 455 U.S. 983 (1982) (under faulty pre-*Widmar* analysis, equal access held unconstitutional *per se*, since religious speech not fully protected by First Amendment); *Johnson* v. *Huntington Beach Union High School District*, 68 Cal. App. 3d 1, 137 Cal.Rptr. 43 (Cal. Ct. App.), *cert. denied*, 434 U.S. 887 (1977) (same); *Trietley* v. *Board of Education*, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (N.Y. App. Div. 1978) (Establishment Clause violated).

interests to meet in its facilities. This is particularly true where the limited forum is open to all groups which wish to meet, as the Williamsport High School activity period is open to all student groups. Any student activity can meet that contributes "to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." P.App. A at 9a; J.A. 65, 67, 90, 103. As a result, more than twenty-five student organizations currently meet during the activity period; fifteen past groups could be reactivated; and the potential number of groups is limited only by the number of students who wish to exercise the option of forming a group. P.App. A at 8a; P.App. C at 81a, 91a. The high school has never denied any other student group permission to meet. *Id.*

Second, the availability strongly indicates that the individual's decision to associate with religious speakers rather than nonreligious speakers is truly voluntary and uncoerced by the state. See *Mueller*, 103 S. Ct. at 3069 (where "aid to parochial schools is available only as a result of *decisions of individual parents* 'no imprimatur of state approval', *Widmar* at 274, can be deemed to have been conferred on any particular religion, or on religion generally") (emphasis added). Both courts below repeatedly emphasized both the complete voluntariness of the students' decisions to participate in any of a broad range of activities and the neutrality of school officials in the students' selection of activities. P.App. A at 8a, 18-20a; P.App. C at 96a. A student religious group in this case exists *only* if individual students, acting completely at their own discretion, decide to form such a group. *Id.* Before every activity period, each student decides which activity, if any, to attend that particular day and must leave the homeroom to go to the activity. P.App. A at 55a (Adams, J., dissenting).

Thus, as in *Widmar*, the reasonable inference is that the high school does not endorse these students' religious

speech. The activity period is available to a broad class of speakers, a few of whom engage in religious speech. Equally important, the number of groups indicates, and the record confirms, that the decision of each student to attend a particular group, or not to attend any group, is made without interference from school authorities.[24]

b. *High school students are capable of accurately perceiving equal access for students' religious speech as state neutrality.*

The court below held that these students' free speech right to meet during the activity period was outweighed by the Establishment Clause solely because the limited open forum was created by a public high school rather than a public college. The court below seemed to concede that, in reality, equal access for these students' religious speech would be merely neutral accommodation of their speech and not state advancement. Nonetheless, the court held, as a matter of law, that high school students are incapable of correctly perceiving equal access as neutrality. P.App. A at 25a (high school students are incapable of understanding "*the fact* that permission for Petros to meet would be granted out of a spirit of neutrality toward religion and not advancement") (emphasis added).

In so holding, the court below failed to understand correctly the real issue regarding high school students' perception of equal access for religious speech. The issue is *not* whether misperception of state endorsement is "possible" (P.App. A at 26a), but whether misperception is "reasonable". *Widmar*, 454 U.S. at 274 n.14. On the facts in this case, such a misperception is not reasonable. *See*

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[24] There is no empirical evidence that religious groups will dominate the activity period if an equal access policy is implemented. See *Widmar*, 454 U.S. at 275 (empirical evidence of domination of a forum by religious groups might cause an equal access policy to have a primary religious effect). Less than two percent of the student body has ever attended a Petros meeting.

supra pp. 23-27.[25] The issue is *not* whether high school students are as mature as college students or adults, but whether they are capable of understanding that equal access for religious speech is state neutrality, not state endorsement. High school students are capable of correctly perceiving state neutrality. *See infra* pp. 29-33. The issue is *not* whether a misperception by some unidentified students might possibly occur, but whether correction of that misperception can be achieved by means less drastic than an absolute prior restraint on these students' religious speech. Adequate means of correcting any misperception exist. *See infra* pp. 42-43.

Before placing a prior restraint on these students' free speech rights, the state must demonstrate that high school students are incapable of drawing the reasonable inference that equal access is state neutrality toward religion. Conclusory statements that high school students are incapable of making such a distinction contradict the concrete evidence to the contrary found in: 1) previous decisions of this Court and lower federal courts affirming the ability of high school students to make such distinctions; 2) Congressional findings of fact in support of the Equal Access Act; and 3) the facts in this case.[26] Since

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[25] In the cases in which this Court has found that school officials have not acted neutrally but have promoted religion, the students' perception of state endorsement has been not only reasonable but accurate. *See supra* note 20. This Court has never held that a speculative, *inaccurate* perception of *private* religious speech as state speech justifies a prior restraint. Loewy, *supra* note 14, at 146-47 (student perception legitimate concern in school prayer cases but not in equal access cases); Wisconsin Note, *supra* note 14, at 184 (same).

[26] See *Country Hills Christian Church*, 560 F. Supp. at 1216 (rejecting as "speculative" and unsupported by empirical evidence school district's argument that students will misperceive equal access); *McCreary* v. *Stone*, 739 F.2d at 727 (insubstantial testimony to support different primary effect test for children than adults).

public perception of constitutional rights is often molded by the federal courts, if allowed to stand, the decision below may prove to be a self-fulfilling prophecy.

1) *Federal court decisions.* High school students are able to hear other students' controversial expression without misperceiving school endorsement. *See generally, Tinker,* 393 U.S. at 511 (students on campus are not "closed-circuit recipients of only that which the State chooses to communicate"). Students will not misperceive fellow students' refusal to salute the flag, due to religious convictions, as school endorsement of their religious or political views. *See generally, West Virginia Board of Education* v. *Barnette,* 311 U.S. 624 (1943). Students are capable of understanding that the study of the Bible as history or literature in public school courses does not imply state endorsement of its religious teachings. *Schempp,* 374 U.S. at 225 (1963). Nor does the accommodation of released time programs for religious instruction during the school day signal to students state approval of religion. *Zorach* v. *Clauson,* 343 U.S. 306, 311 (1952). This Court has also upheld the availability to students of controversial materials in the school library with which the school board does not agree. *Board of Education* v. *Pico,* 457 U.S. 853 (1982) (Brennan, J., for the plurality).

Since students are presumed capable of understanding that the objective teaching of the Bible as part of the curriculum does not signify state endorsement of its religious teachings (*Schempp*), that the adjustment of the school schedule to allow students to receive religious instruction does not signify state endorsement of that instruction (*Zorach*), or that the school's purchase and placement of controversial materials on the school library shelves does not signify state endorsement of their content (*Pico*), then high school students should be presumed able to correctly perceive equal access for a student reli-

gious group as state neutrality toward, not state endorsement of, their views.[27]

This Court has given high school students, indeed students below the high school level, the power to make life-changing decisions without state, or even parental, interference. See *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (a mature minor generally may decide to have surgery to terminate her unborn child's life without parental notification or state consent); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (statutory prohibition on sale of contraceptives to minors unconstitutional); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976) (statute giving absolute parental veto in minor's decision to have abortion unconstitutional).[28] In addition, many high school students possess the franchise, a nationally important political power. U.S. Const. Amend. XXVI.

The lower federal courts consistently have recognized high school students' ability to hear controversial views

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[27] The Court has not distinguished between speech taking place during curricular instruction and speech occurring during extracurricular time. See *Tinker* (wearing of armbands protected during curricular and extracurricular parts of school day); *Schempp* (curricular instruction regarding Bible); *Zorach* (released time during school day); *Barnette* (flag salute part of school curriculum). Furthermore, these decisions have involved students below high school age. See *Pico* (junior and senior high); *Tinker* (elementary, junior and senior high); *Schempp* (elementary and secondary students); *Zorach* (elementary and secondary students); *Barnette* (elementary and secondary students).

[28] Students have noted the irony of being able to make such drastic decisions while being barred from talking about religious matters:

> [High school students] really make a lot of decisions. I can decide if I want an abortion, or if I want to use contraceptives, but I can't decide if I want to come to a meeting to talk about religious matters before or after school. To me this just isn't fair.

Hearings, supra note 8 at 38 (testimony of Ms. Bonnie Bailey).

without perceiving school endorsement, whether expressed by students in school newspapers,[29] school assemblies,[30] or student groups,[31] by teachers in the classroom,[32] or by materials in the school curriculum.[33] The federal courts have found high school students to be "surprisingly sophisticated, intelligent, and discerning." *Wilson* v. *Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976).[34]

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[29] *See, e.g., Gambino* v. *Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977) (school cannot prohibit contraceptive information in student newspaper funded and sponsored by school); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975) (same).

[30] *See, e.g., Fraser* v. *Bethel School Dist.*, 755 F.2d 1356, 1363 (student's sexually suggestive speech at school assembly protected).

[31] See *Dixon* v. *Beresh*, 361 F. Supp. 253 (E.D. Mich. 1973) (to deny recognition to student socialist group "for the reason that it advocates 'controversial' ideas is patently unconstitutional").

[32] *See, e.g., James* v. *Board of Education*, 461 F.2d 566, 568, 573-74 (2nd Cir.), *cert. denied*, 409 U.S. 1042 (1972) (high school students are able to distinguish between the official views of the school board and a teacher's wearing of an armband in class "as an expression of [his] *religious* aversion to war") (emphasis added); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (high school students can understand that teacher's refusal to salute the flag reflects her personal views not those of the school); *cf., National Gay Task Force* v. *Board of Education*, 729 F.2d 1270 (10th Cir. 1984) (teachers' speech advocating homosexual activity protected unless normal school activities are materially or substantially disrupted), *aff'd by an equally divided court*, 53 U.S.L.W. 4408 (U.S. Mar. 26, 1985).

[33] *See, e.g., Grove* v. *Mead School District No. 354*, 753 F.2d 1528, 1540-41 (9th Cir. 1985) (Canby, J., concurring) (curricular material containing passages referring negatively or profanely to Jesus Christ does not convey governmental endorsement of those religious views).

[34] In ruling that a teacher's guest to speak in support of Communism must be allowed access to political science class, the court in *Wilson* noted that high school students "are far from easy prey for even the most forcefully expressed, cogent, and persuasive words." 418 F. Supp. at 1368. *See also, Seyfried* v. *Walton*, 668 F.2d 214,

High school students are exposed repeatedly to controversial ideas both in and out of school, and "are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives". *Fraser*, 755 F.2d at 1363. Indeed, the federal courts have been acutely aware of the fact that high school students are very near, if not past, the age of legal adulthood.[35]

The courts send a confusing and contradictory signal. High school students are presumed able to distinguish other students' controversial expression, and even controversial curricular and teachers' classroom expression, from state endorsed speech. Inconsistently, however, the court below held as a matter of law that high school students are not able to distinguish other students' extracurricular religious speech from state endorsed speech. See Yale Note, *supra* note 14, at 504-505 ("view of the high school student adopted by the courts in religious cases conflicts directly with the position taken when nonreligious forms of First Amendment activity are at issue").[36]

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219 (3rd Cir. 1981) (Rosenn, J., concurring) ("the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school"); *Koppell* v. *Levine*, 347 F. Supp. 456, 464 (E.D.N.Y. 1972) (recent "legislation, judicial decisions and evolving social attitudes" have altered traditional view of students' rights).

There is empirical psychological evidence supporting this presumption of the high school students' intellectual maturity. Several studies indicate that, by age 14-15, adolescents gain the sophisticated cognitive capacity necessary to form their own ideas, to disagree with the views of peers and authority figures, and to establish the personal ideals and values of self-identity. See Yale Note, *supra* note 14, at 507-509.

[35] As the Second Circuit concluded in *James*: "[i]t would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." 461 F.2d at 574.

461 F.2d at 574.

[36] The Second Circuit's inconsistency in recognizing high school students' ability to separate *teachers'* classroom speech from school

Public high school officials must teach students, by word and deed, the meaning of the Bill of Rights. *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979). High school officials should not be required to perpetuate misperceptions and, thereby, build into society false notions about the First Amendment. They can teach tolerance and respect for student expression, including students' religious speech, as well as the correct functioning of the First Amendment, which limits state religious speech but protects the citizen's religious speech. The nation itself has a great deal at stake. "[I]f schools continue to teach students that religious speech is taboo, our country will reap a harvest of religious intolerance. Individuals raised on the notion that public religious speech is forbidden in schools will learn to apply that teaching and prohibit it in other areas." S. Rep. 98-357, 98th Cong., 2d Sess. 12 (1984). As Judge Adams concluded, "[w]hen the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it." P.App. A at 62a (Adams, J., dissenting).[37]

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endorsement in *James* and *Russo* while subsequently denying high school students' ability to separate *peers'* personal speech from school endorsement in *Brandon* has been noted by legal commentators. Loewy, *supra* note 14, at 146-47 (noting *Brandon* adopted Spartan view of educational process that has been rejected by this Court since *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)); Wisconsin Note, *supra* note 14, at 185; Georgetown Note, *supra* note 14, at 148 n.102; Yale Note, *supra* note 14, at 503-505 (contradiction between *Brandon* and *James* is "particularly striking").

[37] In justifying its denial of these students' free speech, the court below concluded that it is "asking much" of high school students "to comprehend the subtleties and intricacies of the first amendment". P.App. A at 30a. If true, this is a tragic statement—that a proper understanding of the First Amendment is beyond the comprehension of the normal citizen. In the current debate over the legitimate purposes of public education, nearly universal consensus exists that a primary mission of education is to prepare students to participate wisely in the political process. Notably, the Pennsylvania

2) *Congressional findings.* Congress has weighed and rejected the argument that high school students will not understand that neutral treatment of a student religious group is not state endorsement of religion. The Senate Report on the Equal Access Act. 20 U.S.C.A. Sect. 4071-74, states: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S. Rep. 98-357 at 35; see *id.* at 9-10.[38] In so finding, the Committee heard the testimony of many witnesses, including constitutional lawyers[39] and high school students.[40] Based on the students' testimony, the Committee further found "that students

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legislature believes that high school students can and must be taught its proper functioning. 24 Pa. Cons. Stat. Sec. 15-1545 (1983) (requiring public schools to have a "Bill of Rights Week" "to instill into pupils' minds thereof [its] purpose, meaning and importance").

[38] See *Amidei* v. *Spring Branch Independent School District*, No. H-84-4673 (S.D.Tex. April 26, 1985) (bench ruling that Equal Access Act constitutionally protects equal access for high school students' religious group).

[39] For example, Professor Laurence Tribe testified by letter that *Widmar* should protect secondary school students' religious meetings "provided only that the student meetings at issue are not state-initiated, school-sponsored, or teacher-led. . . ." *Hearings, supra* note 8 at 19 (statement of Sen. Hatfield); see *Religious Speech Protection Act, Hearing on H.R. 4996 Before the Subcomm. on Elem., Sec. and Voc. Educ. of the House Comm. on Educ. and Labor*, 98th Cong., 2nd Sess. 46-52 (testimony of Laurence Tribe).

[40] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Hearings, supra note 8 at 64 (testimony of Sarah Scanlon).

reasonably perceive the denial of access for religious speech as State hostility toward religion." *Id.* at 36; *see id.* at 10-12. Given the particular ability of the legislature to gather and analyze information, Congressional findings of fact are to be accorded substantial deference, even for the purpose of constitutional adjudication. *See, e.g., Rostker* v. *Goldberg*, 453 U.S. 57 (1981).

In passing the Act, by votes of 88-11 in the Senate and 337-77 in the House, Congress overwhelmingly affirmed its support of the *Widmar* decision and its application to the extracurricular religious speech of secondary school students.[41] In essence, Congress recognized that equal access is a reasonable and necessary attempt to resolve the longstanding debate regarding religious activity on the public school campus.[42]

3) *The facts in this case.* After carefully examining the facts of this case, District Court Chief Judge Nealon

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[41] *See, e.g.*, 130 *Cong. Rec.* S.8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *id.* at S.8355 (statement of Sen. Levin); *id.* at S.8356 (statement of Sen. Bumpers); *id.* at S.8364 (statement of Sen. Thurmond); *see also, Student Coalition for Peace* v. *Lower Merion School Dist.*, No. 84-1017 (E.D. Pa. Jan. 31, 1985), *appeal docketed*, No. 85-1092 (3rd Cir.) (in the Equal Access Act "it was Congress' intent to expand the *application* of the Supreme Court's decision in *Widmar* to secondary schools").

[42] An ad hoc committee has formulated guidelines for school administrators for implementation of the Act. 130 *Cong. Rec.* H.12270 (daily ed. October 11, 1984) (statements of Rep. Bonker and Rep. Goodling). The ad hoc committee consisted of the following groups: Christian Legal Society, American Civil Liberties Union, American Association of School Administrators, National Education Association, National Association of Evangelicals, Baptist Joint Committee on Public Affairs, Americans for Democratic Action, and General Conference of Seventh-Day Adventists. Additional groups agreeing to the guidelines included: American Federation of Teachers, Catholic League for Religious and Civil Rights, Christian Educators Association, Freedom Council, National Association of Christian Educators, National Council of Churches of Christ in the U.S.A., and People for the American Way.

rejected "the notion that, under the circumstances of this case, high school students would perceive the 'open forum' policy as tacit endorsement by school officials of a club's religious activity." P.App. C at 93a. Those educational experts closest to the students have judged that high school students are capable of forming their own groups, which implies they can recognize that the groups formed reflect the students' interests and not necessarily the judgment of the school. P.App. A at 19a; *id.* at 49a (Adams, J., dissenting).[43] The principal believes that the students' maturity has increased in recent years. J.A. 81. The students' decisions to participate in any of a broad range of activities occurring during the activity period is completely voluntary, and school officials remain neutral in the students' selection of activities. P.App. A at 8a, 18-20a; P.App. C at 96a.

Furthermore, school officials had not received any complaints before they banned the students' speech. J.A. 76, 96. After a year of meeting at the school during 1983-84, there still is no evidence that students at Williamsport Area High School perceive allowing Petros to meet as official endorsement of religious activity.[44]

Finally, these students have gone the extra mile in their desire to avoid any appearance of state support for their religious beliefs. They have agreed to forego use of school media, to post a disclaimer, to meet in the school cafeteria rather than a classroom, and to have a non-teacher monitor or no monitor at all. *See infra* pp. 42-43. The students do not want any perception of state endorsement; they just want to meet.

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[43] In his deposition, Principal Newton testified that Williamsport High School students performed above average academically and on standardized tests measuring intelligence and students' needs and desires, i.e., maturity. J.A. 80-81, 94, 97-98.

[44] See *The New York Times, supra* note 6 ("But at the Williamsport High School, by all accounts there has been no hint of pressure for students to join Petros, which has both supporters and opponents in the Williamsport community, and nothing resembling official endorsement of religious activity.").

c. *The additional factors relied on by the Third Circuit are similarly invalid.*

As a result of its decision that high school students are legally incapable of perceiving that equal access for students' religious speech is state neutrality not state advancement of religion, the court below found that three factors would create a misperception of state endorsement of these students' speech. However, "the predicted effect of these institutional differences [between *Widmar* and Williamsport]—that the presence of Petros will be perceived as state endorsement of religion—represents uncorroborated speculation without any basis in the record." P.App. at 54a (Adams, J., dissenting).

(1) *Compulsory attendance laws.* Two issues underlie the discussion of compulsory attendance laws. Does the existence of such laws: 1) transform every form of speech on school property during hours of compulsory attendance into state-endorsed speech or 2) coerce students into attending these students' religious meeting? [45]

The court below held, in effect, that compulsory attendance laws transform all extracurricular student meetings into coercive activities. The issue of coercion again highlights the fundamental difference between equal access and the traditional school prayer cases—who is speaking. If the speaker is the state, then the compulsory attendance laws are providing a captive audience for state religious speech. However, if the speakers are students expressing a personal viewpoint, the courts have repeatedly recognized that high school students are capable of distinguishing between students' personal expression and state endorsement, even when the

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[45] A significant number of students at Williamsport Area High School are not required to attend school, since they are 17 years of age or older. 24 Pa. Stat. Ann. Sections 13-1326, 13-1327 (1983).

students' speech takes place during compulsory attendance time. *See supra* pp. 29-33.

Nor does the existence of compulsory attendance laws coerce students to attend Petros. The logic of this argument collapses under the weight of the facts, particularly the broad number of student groups and the voluntariness of their meetings. If merely allowing a religious student group to meet coerces non-participating students, then students must simultaneously also feel coerced to belong to Key Club, Future Homemakers of America, Ecology Club, or any of the other twenty-five student groups meeting during the activity period.

In addition, a student religious group would exist only if individual students, acting completely at their own discretion, decided to form a group. P.App. A at 8a, 18-20a ("unlike compulsory instructional classes, . . . the very existence of such organizations depends entirely upon voluntary student participation and interest"). Attendance at a group requires that the student make a conscious decision to leave homeroom and affirmatively choose to meet with a particular student group out of the wide range of activities available. As Judge Adams concluded, "[I]n view of the voluntariness of a student's decision to attend a specific activity, the fact of compulsory attendance is irrelevant." *Id.* at 55a; see *id.* at 45a.

(2) *The nonparticipatory presence of an adult monitor.* The court below agreed that school policy did not require teacher participation in a student group and that a teacher had not participated in the content of these students' religious meetings. P.App. A at 9a, 26-27a; P.App. D at 107a. Nonetheless, the court below held that the presence of any person, whether a school employee or a parent, would be perceived as state endorsement of that group's speech solely because the state gave administrative approval to that person to function as a monitor. *Id.* at 27a.

To the contrary, however, there is "no possibility that the monitor's presence . . . could be misconstrued as school endorsement of Petros." *Id.* at 56a (Adams, J., dissenting). The monitor is merely "the functional equivalent of a policeman at a religious rally held in a public park." P.App. C at 100a, *citing O'Hair* v. *Andrus*, 613 F.2d 931, 935 (D.C. Cir. 1979). The mere presence of a monitor whom the school has administratively approved does not communicate state endorsement of students' speech, particularly given that high school students can distinguish a teacher's classroom speech from state endorsed speech. *See supra* pp. 29-33.[46]

Teachers are capable of functioning solely as monitors to protect the physical safety of the students and school property. Teachers in public schools must walk a fine line every day in dealing with topics such as comparative religion, history, literature, philosophy, and science, which sometimes touch on religious values and issues. The law assumes a teacher can be neutral in a curricular setting. *Schempp*, 374 U.S. at 225 (teaching religion objectively); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (teaching theory of origins); *Zorach*, 343 U.S. at 313 (teacher monitoring students' attendance at religious classes). The same teacher can be neutral in an extracurricular setting when functioning as a monitor.

(3) *Location of the forum.* The court below held that the students' meeting on school premises in itself would create the perception of school approval of the content of the students' speech, citing *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). However, as already noted, the court below recognized that controlling differences exist between *McCollum* and the self-initiated

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[46] Moreover, as Judge Adams noted below, "out of an abundance of caution" the court could require that "Petros meetings be monitored by a non-teacher." P.App. A at 56a. Indeed, the students are willing to meet without any monitor. P.App. C at 100a.

extracurricular religious activity in the present case. P.App. A at 28a; *see supra* pp. 20-21.[47]

3. *Equal access for these students' religious speech does not create an excessive entanglement between the state and religious institutions.*

The court below held that to allow Petros to meet would violate the excessive entanglement prong. It feared having to determine when students' speech is religious and when it is not, a legitimate fear which favors allowing these students to meet.[48] As this Court noted in *Widmar*, the school "would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech' " than by allowing a religious student group to meet. 454 U.S. at 272 n.11. Indeed, administrative discretion to determine whether citizens' speech is or is not religious is

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[47] The court below argued that these students' presence would be more obvious than that of the students in *Widmar*. P.App. A at 26a. The facts belie this argument: Petros has met in the school cafeteria away from the other classrooms; 98 percent of the student body are elsewhere than at the Petros meeting; and the students agreed to forego any use of school media. *See infra* pp. 42-43. Furthermore, in 1983, approximately 543, out of a total of 1481, public colleges, including community and four-year colleges, had enrollments of less than 2500 students. National Center for Education Statistics, U.S. Department of Education, *Digest of Education Statistics*, forthcoming (1985). The number of groups currently meeting during the activity period at Williamsport High (over 25 groups in a student body of 2500) is proportionately the same as the number meeting at the university in *Widmar* (over 100 groups in a student body of 11,000).

[48] Mistakenly, the court below suggested that excessive entanglement would result from the necessity of constantly interpreting Petros announcements to insure that no religiously oriented material would be communicated on the bulletin board, public address system, or the school newspaper. P.App. A at 33-34a. This is a misinterpretation of the students' simple, easily administered offer to forego completely the use of the school media. Thus, there is no need for the school to decide whether material is religiously oriented or not. *Id.* at 59a (Adams, J., dissenting).

unconstitutional. *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1943).

Such determinations would create a "no-win" situation for high school officials. See *Country Hills Christian Church*, 560 F. Supp. at 1218 (specific examples of administrators' attempts to draw line between religious and nonreligious speech, resulting in excessive entanglement). Many student groups are arguably religious that do not read the Bible and do not pray during their meetings but, nonetheless, discuss ideas that have strong religious implications, including groups discussing philosophy, literature, peer problems, personal or societal values, or political action. School officials still would be subject to lawsuits. However, now the lawsuits would challenge school officials' determinations that certain groups denied permission to meet were religious or that certain groups permitted to meet were nonreligious.[49] Equal access avoids these constitutional and administrative difficulties.[50]

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[49] For example, in the Williamsport High School yearbook, several groups list activities that are arguably religious speech: singing sacred, Christmas and gospel music (J.A. 112-13, 131, 137-38); performing in churches (J.A. 140); and sponsoring Christmas festivities (J.A. 116, 130, 132). Also, the purpose of Peer Helpers, a group meeting during the activity period, is analogous to that of Petros—students assisting other students with the personal problems they face. See J.A. 66.

[50] The court mentions a fear that Petros would create divisiveness. P.App. A at 42a, 44-45a. Political divisiveness might be a legitimate concern if school officials were determining the religious content of a curricular activity, *e.g.*, the content of an opening classroom prayer. It is not a legitimate concern, but rather a "heckler's veto", when school officials are merely treating neutrally students' religious and nonreligious extracurricular speech. However, the student body has not been divided by allowing Petros to meet. *See supra* note 6.

Moreover, this Court recently held that no inquiry into potential divisiveness is called for when a direct subsidy to church-sponsored

III. THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER LESS RESTRICTIVE ALTERNATIVES TO AN ABSOLUTE BAN ON HIGH SCHOOL STUDENTS' RELIGIOUS SPEECH.

Traditional free speech analysis requires that, even if the state demonstrates a compelling state interest, any restriction on speech must nonetheless be narrowly drawn. *See, e.g., Widmar*, 454 U.S. at 270; *Perry Education Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. at 46; *Police Department of Chicago* v. *Mosley*, 408 U.S. at 101. The court below required a prior restraint on the students' speech, without considering whether less restrictive alternatives, which had been proposed by the students, would satisfactorily meet its speculative Establishment Clause concerns.

A number of suitable alternatives exist. A simple disclaimer by the high school could affirmatively convey a message of state neutrality. See *Widmar*, 454 U.S. at 274 n.14 (university disclaimer of its name's use made reasonable inference of support less likely).[51] The dis-

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schools or colleges or other religious institutions is not involved. *Lynch* v. *Donnelly*, 104 S. Ct. at 1364-65, *citing Mueller*, 103 S. Ct. at 3071 n.11; P.App. A at 60a n.11 (Adams, J., dissenting).

[51] Additional speech is the preferred and required alternative to censorship. *See Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 97 (1977) (prohibition on commercial speech struck down since less restrictive alternative of counter-publicity equally effective); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87 (1980) (mistaken identification of particular speaker's views with those of property owner remedied by owner's public disclaimer); *McCreary* v. *Stone*, 739 F.2d at 728 (disclaimer protects Establishment Clause concerns), *citing Allen* v. *Morton*, 495 F.2d 65, 67 (D.C. Cir. 1973) (same); *U.S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 708 F.2d 760, 772 (D.C. Cir. 1983) (FAA ban on political advertisements in airport unjustified since disclaimers can correct misperception); *Koppell*, 347 F. Supp. at 460 (prior restraint on student magazine not justified since school could place disclaimer on each copy); Georgetown Note, *supra* note 14 at 156; Loewy, *supra* note 14 at 145.

claimer could appear in the school media or as a sign on the door of the room in which the students meet.

Similarly, education itself is a wholesome alternative to censorship. See *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). A short lesson in homeroom or social studies class on equal access and the First Amendment would dispel any misperception, as well as furthering the school's primary mission of preparing students to participate in the political process. *See supra* pp. 33.

As additional alternatives, the students offered to have a nonteacher monitor or no monitor, since school policy does not require that a faculty member act as advisor to a club. P.App. A at 56a (Adams, J., dissenting); P.App. C at 100a; J.A. 144. The students agreed to forego use of the school media to announce their meetings. P.App. A at 59a (Adams, J., dissenting); P.App. C at 96a. Finally, they have met in the cafeteria away from other groups' meetings. P.App. A at 56a (Adams, J., dissenting).

Besides failing to apply the less restrictive alternatives standard, the court below further departed from the traditional free speech analysis, committing three fundamental errors. It effectively placed the burden on the students to demonstrate that the Establishment Clause would not be violated rather than on the state to prove it would be violated. See *Widmar*, 454 U.S. at 269-70; *Healy* v. *James*, 408 U.S. at 184-85 (erroneous placement of burden of proof on students rather than college requires reversal); *Tinker*, 393 U.S. at 511 (school must make "specific showing of constitutionally valid reasons to regulate [student] speech"). This is particularly egregious when the facts solidly support the district court conclusion that the Establishment Clause would not be violated.

The court below also erroneously assumed that religious speech is less protected in a limited public forum created by a high school. P.App. A at 42a. This is contrary to *Widmar*, 454 U.S. at 269-70, and makes the court's opinion internally inconsistent. *Cf.* P.App. A at 12a (religious speech is no less protected than other speech).

Finally, the court below stated that discriminatory exclusion of religious speech from the student activity period was permissible, arguing that it would "be compensated in substantial measure by alternative means of communication which exist throughout the community." P.App. A at 42a. There is no evidence in the record to support this proposition. The students requested permission to meet during the student activity period in order to draw support from one another as holders of common religious beliefs in a secular school environment, and to discuss how to apply the principles of their faith to the unique set of circumstances they face at school as opposed to at home or at church. The opportunity to meet off-campus at night or on weekends is insufficient to meet these dual goals, especially given that the high school students are drawn from approximately a 100 square mile area. *See supra* note 4 (released time not a feasible alternative). On advice of counsel, school officials consider meeting on campus before or after school equally unconstitutional. J.A. 75, 93.

Moreover, even if adequate alternative fora did exist, they would be constitutionally irrelevant where the exclusion of speech results from content-based discrimination and not content-neutral time, place or manner restrictions. This Court on numerous occasions has stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place". *Schneider* v. *State*, 308 U.S. 147, 163 (1939); see *Healy* v. *James*, 408 U.S. at 183 (ability of student group to meet off-

campus immaterial). The right to engage in religious expression does not meaningfully exist if it may be exercised only in areas which a "benevolent government" designates as a "safe haven for crackpots." See *Tinker*, 393 U.S. at 513.[52]

IV. ACCOMMODATION OF HIGH SCHOOL STUDENTS' RELIGIOUS SPEECH PRESERVES THE PROPER BALANCE AMONG THE FIRST AMENDMENT CLAUSES.

A. Accommodation of high school students' religious speech avoids an unnecessary conflict between the Free Speech Clause and the Establishment Clause.

Accommodation of the religious interests of students by school officials does not violate the Establishment Clause. *Zorach* v. *Clauson*, 343 U.S. 306 (1952). In writing for the Court, Justice Douglas rejected the notion that public school officials cannot accommodate the religious interests of students: "To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Id.* at 314.[53]

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[52] The court below opined that religion belongs at home and in religious institutions and imposed its predilection on these students. P.App. A at 45a. Different longstanding traditions exist among religious groups with respect to whether to confine their overt religious expression to their homes and religious institutions, or to express their beliefs in all aspects of their lives, including time spent outside the home and religious institutions. Both traditions are genuine and sincerely held. However, nothing in the Constitution suggests one has greater legitimacy than the other, and the Constitution does not allow one to be given preference over the other, as is the result of the decision below. Neutral accommodation of equal access allows religious persons to act in accordance with their different traditions. Denial of equal access imposes one tradition on those holding the other. In addition, the decision below makes any Establishment Clause analysis futile in the public high school context. Yale Note, *supra* note 14, at 510.

[53] This Court has repeatedly reiterated the principles of accommodating neutrality. *See, e.g., Lynch* v. *Donnelly*, 104 S. Ct. 1355,

Because it ignored the accommodation principle, the court below believed it faced a "constitutional conflict of the highest order" between the Free Speech and Establishment Clauses. P.App. A at 36a. The Establishment Clause concerns can be addressed more than adequately without an absolute prohibition of the students' free speech rights. *See supra* pp. 42-43. However, even if this conflict truly did exist, the speculative Establishment Clause concerns should not prevail over these students' free speech rights for several reasons.

Since the core purpose of the First Amendment is to protect individual liberties, the balance should weigh heavily in favor of protecting free speech rights as opposed to requiring state suppression of religious speech. *See generally, McDaniel*, 435 U.S. 618 (1978); *Norwood* v. *Harrison*, 413 U.S 455, 469 (1973) (free exercise transcendent over Establishment Clause values where religion indirectly benefitted); *cf.*, L. Tribe, *American Constitutional Law*, Sec. 14-7 (1978) (Free Exercise Clause prevails over Establishment Clause as "the natural result of tolerating religion as broadly as possible rather than

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1359 (1984) (the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-46 (1976) ("scrupulous neutrality by the State, as among religions," enforced but "a hermetic separation of the two is an impossibility") (Blackmun, J., plurality opinion); *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970) ("benevolent neutrality . . . permit[s] religious exercise to exist without sponsorship and without interference"). Indeed, this Court has frequently required state accommodation of individual religious beliefs and expression. *Widmar*, 454 U.S. 263 (1981) (state university required to allow students to meet on campus for religious activities); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *see also McDaniel*, 435 U.S. at 638 (Brennan, J., concurring) ("the limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause").

thwarting at all costs even the faintest appearance of establishment").

Arguably, the Establishment Clause is not self-enforcing, but is itself dependent on freedom of speech for effectuation. See *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) (freedom of speech is the "matrix, the indispensible condition, of nearly every other form of freedom"). If freedom of speech is not protected, the Establishment Clause is dependent on the good faith of the state that it will not engage in value-laden, even subtly religious speech, without fear of challenge by a silenced citizenry. However, if freedom of speech is fully protected, citizens can restrain even the most direct religious speech by the state.

In addition, the Establishment Clause concerns raised by the court below rest on unsupported conjecture that students will misperceive constitutional reality, *i.e.*, the fear that students will misperceive equal access for religious speech, which in reality is state neutrality, as state advancement of religion. Thus, to choose the Establishment Clause over the Free Speech Clause in this context would be to sacrifice the fundamental free speech rights of high school students with the result of perpetuating, and indeed encouraging, constitutional misunderstandings on the part of students. The Constitution cannot operate in such a manner. See *Tilton* v. *Richardson*, 403 U.S. 672, 679, 682 (1971) ("hypothetical profile" does not justify holding Act of Congress unconstitutional under the Establishment Clause); *see supra* pp. 27-33.

Importantly, the denial of equal access itself creates more problems under the Establishment Clause than it solves. It requires that school administrators police students' speech, determining which is and is not religious, which itself creates excessive entanglement. *See supra* pp. 40-41. Also, denial of equal access imposes one religious tradition on those holding another religious tradition. *See supra* note 52. Finally, the Establishment Clause prohibits state hostility toward religion. As Con-

gress found in passing the Equal Access Act, students are interpreting the denial of equal access by their school districts and by federal courts as hostility toward religious speech. S. Rep. 98-357 at 10-12, 36. This concern also has been raised by federal judges considering this issue:

> Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief? . . . We should not forget, however, that the young student may also be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. I would consider that a very great wrong to the children, to the Constitution, and to the Nation.

Lubbock Civil Liberties Union v. *Lubbock Independent School District*, 680 F.2d 424, 426 (5th Cir. 1982) (denial of petition for rehearing en banc) (Reavley, J., dissenting); *accord*, P.App. A at 53a (Adams, J., dissenting).

B. Prohibition of student-initiated extracurricular religious speech is constitutionally and practicably untenable.

The court below adopted a *per se* rule which "essentially rests on the view that collective religious speech simply may not take place within the walls of a public secondary school without violating the Constitution." P.App. A at 45a (Adams, J., dissenting); *id.* at 43a n.30. The practical implications of such a position are as troubling as the constitutional problems already discussed.

If private religious speech must be prohibited on public school property, the inexorable logic of this position will effectively terminate individual students' religious freedom at school. Besides causing many school administrators to prohibit religious student meetings, decisions similar to the one below have led many school administrators to prohibit all forms of private religious expression on school campus. For example, community service

activities by students have been prohibited [54]; religious conversations have been banned between students [55]; individual acts of religious observance have been banned [56]; research papers by students on religious topics have been prohibited [57]; and student yearbooks have been censored.[58]

Students whose personal conduct is otherwise exemplary may be disciplined solely for expressing their religious values and ideas at a time when other students are allowed to express themselves. The Constitution does not require school officials to discriminatorily ban students' extracurricular religious speech, and it should not require them to alienate a small number of students whose enrollment in the public high schools is beneficial to those schools.

The students before this Court have suffered a concrete violation of their freedom of speech. Their constitutional rights should not be sacrificed to a speculative misperception that is contrary to federal court precedent, congressional findings, and the established facts of this case.

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[54] S. Rep. 98-357 at 16 (benefit dance in school gymnasium for charities such as the American Cancer Society by youth group affiliated with the Young Women's Christian Association (YWCA) prohibited by Lubbock, Texas, school district).

[55] *Id.* at 17 (Boulder, Colorado school administrator prohibits group of two or more sitting together for a spiritual discussion).

[56] *Id.* at 18 (Minnesota fourth grader reprimanded for bowing head before a meal). *See also*, 130 *Cong. Record* S.8335 (daily ed. June 27, 1984) (statement of Sen. Hatch) (reprinting letter of El Paso, Texas, school district threatening blind special education student with review of educational program for engaging in public prayer (the rosary) on school bus and public witnessing of her faith at her school).

[57] S. Rep. 98-357 at 17 (research paper on the Resurrection of Christ unacceptable although papers on breast feeding, suicide notes, and demon possession were acceptable).

[58] See *School Cuts Bible Club From Book—Literally*, The Palm Beach Post, May 28, 1983, at 1 (using razor blades, school administrators cut pictures of students in the Bible Club from student yearbook for fear of Establishment Clause violation).

Equal access reflects our country's historic tolerance for neutral accommodation of religious beliefs. The decision below conveys the opposite message. It teaches high school students that speech is free only if it is purged of religious content and that government neutrality requires invidious discrimination against their own voluntary, self-initiated religious activity. Equal access represents a sound accommodation of religious speech among students within the framework of the First Amendment. As Judge Adams concluded, "[w]hen the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it." P.App. A at 62.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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